

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2008 Session

STATE OF TENNESSEE v. JACK T. JONES

**Appeal from the Criminal Court for Sumner County
No. 993-2006 Dee David Gay, Judge**

No. M2007-01494-CCA-R3-CD - Filed November 10, 2008

In April 2007, the defendant, Jack T. Jones, pled guilty to four counts of aggravated sexual battery, a Class B felony. The defendant was subsequently sentenced as a Range I offender to nine years on each count, with the sentences on three of the four counts to be served consecutively, resulting in an effective sentence of twenty-seven years. On appeal, the defendant argues that the trial court improperly enhanced his sentences for each individual count based on facts not found by the jury beyond a reasonable doubt, a violation his Sixth Amendment rights as interpreted by the Tennessee Supreme Court in State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) (“Gomez II”). The defendant also argues that the trial court improperly imposed consecutive sentences in that the proof established at the sentencing hearing did not justify the imposition of consecutive sentences and that the imposition of consecutive sentences also violated his Sixth Amendment rights as interpreted in Gomez II. After reviewing the record, we conclude that the trial court’s enhancement of the defendant’s individual sentences constituted plain error, and we accordingly reduce the defendant’s sentence on each count from nine years to eight years. However, as Sixth Amendment concerns are not implicated by the imposition of consecutive sentences, and because the evidence produced at the sentencing hearing supported the trial court’s imposition of consecutive sentences, we affirm that portion of the trial court’s judgments. In sum, we reduce the defendant’s total effective sentence from twenty-seven years to twenty-four years.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed
in Part and Reversed in Part; Case Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

John Pellegrin, Gallatin, Tennessee; Peter D. Heil, Nashville, Tennessee, for the appellant, Jack T. Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in November 2006, the Sumner County Grand Jury indicted the defendant on four counts of rape of a child, four counts of incest, two counts of aggravated sexual battery, and one count of contributing to the delinquency of a minor. The victim in these alleged offenses was the defendant's adopted daughter. All of the offenses were alleged to have occurred "on or about Summer 2002 and the year 2003," with the exception of the contributing of the delinquency of the minor charge, which was alleged to have occurred in the summer of 2006. On April 18, 2007, the defendant pled guilty to four counts of aggravated sexual battery, a Class B felony. See Tenn. Code Ann. § 39-13-504(b) (2003). These counts comprised the two counts of aggravated sexual battery as charged in the indictment and two counts as a lesser-included offense of rape of a child. In accordance with his plea, the remaining counts of the indictment were dismissed and the length and manner of the defendant's sentences was left to the discretion of the trial court, which held a sentencing hearing on June 18, 2007.

At the sentencing hearing, Detective Tim Bailey with the Sumner County Sheriff's Department, the lead police investigator in this case, testified that the defendant admitted to molesting the victim. According to the detective, the defendant admitted to touching the victim's vagina four times, while the victim said that her father touched her vagina between five or seven times. Detective Bailey said that the victim also alleged that the defendant, among other things, masturbated in her presence, touched her breasts, and, in the most recent episode, asked her to expose her vagina in exchange for letting her drive his pickup truck. Detective Bailey said that the defendant corroborated many of the victim's allegations.

Detective Bailey testified that both the defendant and the victim told him that the abuse began in the summer of 2002, when the victim was eleven years old. At that time, defendant's wife, the victim's mother, who had been diagnosed with rheumatoid arthritis in February 2002, became increasingly ill and was often bedridden. The defendant informed the detective that "he wasn't getting sexually satisfied by his wife," so he turned his attention toward his eldest daughter. The detective said that the defendant turned toward the victim and not her younger sister, who was a year younger than the victim, because the victim was "more mature looking and they got along better."

Upon further questioning by the court, Detective Bailey testified that the victim indicated that the defendant digitally penetrated her. The detective said that while the defendant denied this allegation, he admitted to "just about everything" else that the victim alleged. Detective Bailey testified that the victim's mother reported these incidents to the Sumner County Sheriff's Office in September 2006. On cross-examination, Detective Bailey said that the defendant was cooperative with the police during their investigation.

Kim Jones, the defendant's wife and the victim's mother, testified that she had been married

to the defendant for just under sixteen years at the time of the hearing, though she was in the process of divorcing the defendant. She said that she and the defendant adopted the victim and her younger sister when the victim was two years old and her sister a year old. Mrs. Jones testified that before she learned about these incidents, she believed that everything was going well with her family except for her husband being fired from two of his jobs, including one which he had held for twenty-nine years. She said that during the summer of 2002, the period when these events began to occur, she was ill with rheumatoid arthritis and was often bedridden.

Mrs. Jones said that she was unaware that the defendant was abusing the victim until September 19, 2006, when the victim disclosed the abuse. Mrs. Jones recalled that while she, the defendant, and the victim were waiting for a telephone call from the victim's teacher that day, the victim told her parents she had to tell them something that she had been hiding. Mrs. Jones testified that she thought that the victim would tell her parents that she had gotten into trouble at school; Mrs. Jones said that at this point, she was aware that her daughter's grades had been declining and that she had been getting into trouble at school. However, Mrs. Jones testified that "all of a sudden [the victim] just told me, Daddy's been touching me." At that point, Mrs. Jones had her daughters pack their belongings; while they were packing, Mrs. Jones confronted the defendant, who admitted that he had touched the victim but did not go into detail about his activities. According to Mrs. Jones, the defendant also admitted touching the victim to her (Mrs. Jones's) father. Mrs. Jones testified that she and her daughters then went to her parents' house, where she called the Sumner County Sheriff's Department, which then began investigating the victim's allegations.

Mrs. Jones said that after she and her daughters moved out of the house, she recorded a telephone call between her and the defendant. During that conversation, a recording of which was played in open court, the defendant said that the abuse only happened once, an account which differed from the victim's version of events. During the conversation, the defendant repeatedly mentioned that he was fearful of being taken to jail. When Mrs. Jones asked the defendant why he did what he did, he said that "it just happened." The defendant also told his wife that while she was bedridden and on medication, "[the victim] was developing . . . she was there . . . [my] hand slipped down there . . . I'm a male, I have hormones." During the conversation, the defendant did not apologize to his wife for his actions.

Mrs. Jones testified that the victim had been receiving counseling since she disclosed her abuse. Mrs. Jones also testified that "[s]ince this all happened, she's been getting in a lot of trouble at school, in-school suspension, detentions, skipping. She took the truck that I had at home and went for a joyride and wrecked it. She ran away from home, and when I found her, she was suicidal," which prompted Mrs. Jones to briefly place her daughter in an inpatient adolescent psychiatric treatment facility. According to Mrs. Jones, the victim was placed on two medications following her stay at the facility, including Trazodone for her depression.

Mrs. Jones testified that the defendant's actions were hard on her as well. She stated that she

was having financial problems that necessitated her selling many of her belongings. She also noted receiving “a lot of harassing phone calls” which necessitated her changing her home and cellular phone numbers. She took out an order of protection against the defendant, but the defendant violated the terms of the order by sending a Christmas card to the family’s home. On cross-examination, Mrs. Jones said that in the card, the defendant mentioned that he was learning Spanish from another prisoner. Mrs. Jones admitted that the defendant did not threaten her family in the card, but she found it unsettling that the defendant was telling the family about another prisoner.

On further examination by the trial court, Mrs. Jones said that when she and her daughters were returning home one afternoon shortly after the victim disclosed her abuse, the family car was followed home by a car driven by an unidentified man. When the family car pulled into the garage, the other car pulled into the driveway, with the car’s driver remaining in the car and “just sitting there with a cold stare.” Mrs. Jones also noted that before the victim disclosed her abuse, she had received counseling and had been prescribed Ritalin, which she was no longer taking. Mrs. Jones also noted that about a year before the victim disclosed her abuse, while she was in the eighth grade, she had been expelled from a private school for letting a boy put his hands down her pants. Mrs. Jones also noted that her other daughter, the victim’s younger sister, was depressed over these events.

The victim, who was fifteen years old at the time of the sentencing hearing, testified that hers was a “normal, average family” before her father began abusing her. She testified that the abuse started when she was eleven or twelve years old and continued through age fourteen. The victim testified that while her father was abusing her, she knew that his actions were wrong, but she did not tell anyone about what she was going through because the defendant told her that nobody, particularly her mother, would believe her were she to complain. The victim said the defendant “basically was trying to turn me away from my mom, trying to get us so far apart from each other, because he would tell me . . . that she didn’t care about me and she liked my sister more.” She said that her father led her to believe that “this is what it takes for me and my dad to be close.” When the victim did tell her mother about the abuse, she found that her mother did believe her and helped her greatly in dealing with what had happened to her.

The victim testified that around the time she disclosed her abuse, her grades had been dropping and she had been getting into trouble at school. After her disclosure, she began counseling, which was ongoing as of the sentencing hearing. She also began taking two types of medication, a mood stabilizer and a sleeping aid. She said that the counseling was helpful, but she still had problems trusting people. She also noted that after she, her mother, and her sister left the defendant, her mother had to resume working; in addition to the financial strain this move caused, the victim said that her family suffered because she, her sister, and her mother did not get to spend enough time together given her mother’s long work hours.

The defendant did not testify, but he did present three witnesses on his behalf. Sandra Waddell testified that she and the defendant worked together at Baptist Hospital in Nashville for approximately twenty years. Waddell said that the defendant was “excellent at his job,” “very well respected,” and was an honest, caring person who got along well with others. On cross-examination, Waddell said that she had no knowledge of the defendant’s character outside of work. Andy Jones, the defendant’s son from a previous relationship, said that the defendant was a good father who was also active within his church. On cross-examination, he said that during a jail visit, his father admitted that he had “[m]ade a mistake” by inappropriately touching the victim. Jill Hutcherson, the defendant’s sister, testified that he was a responsible father and a well-respected employee who was also involved in his church. She testified that the defendant was ashamed and “very remorseful” about what he had done to his daughter. On cross-examination, Hutcherson said that she first learned about the defendant’s actions from Mrs. Jones and that she was unaware about many of the events about which Detective Bailey and the victim had testified. She also noted writing a letter to the trial court asking for leniency for her brother, who she said was “ashamed and remorseful” over his actions, but she admitted that the defendant did not give her the exact reasons for his feelings.

In his allocution statement, the defendant “express[ed] profound sorrow for the anguish I have placed upon my immediate family, my extended family, and my friends,” as well as for “the time and expense it has place[d] upon the Sumner County judicial system.” He said that his actions represented his “being weak and yielding to temptation by a power not from heaven.” In apologizing, the defendant asked for forgiveness from his family and mercy from the court. The defendant also introduced into evidence a psychosexual evaluation in which the defendant was described as “very amenable to treatment” and unlikely to reoffend.

At the conclusion of the hearing, the trial court sentenced the defendant to nine years on each of the four aggravated sexual battery counts to which he pled guilty. The trial court ran three of the four sentences consecutively to each other, resulting in a total effective sentence of twenty-seven years. This appeal followed.

ANALYSIS

Length of Sentence

The defendant first argues that the nine-year sentences he received on each of the four aggravated sexual battery convictions were excessive. The defendant’s argument is based on his contention that the trial court enhanced his sentences based on factors that were not found by a jury beyond a reasonable doubt, a violation of his Sixth Amendment right to a jury trial as interpreted by this court in State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007) (“Gomez II”). The state argues that the defendant has waived this issue by raising it for the first time on appeal and failing to cite to authority in his brief.

Initially, we note that the state is correct that the defendant did not raise a Sixth Amendment-based challenge to his sentence at the sentencing hearing. This court has held that a defendant who fails to raise a Sixth Amendment-based challenge to sentencing in the trial court waives the issue and may seek relief only under “plain error” review. See State v. John William Matkin, III, No. E2005-02946-CCA-R3-CD, 2007 WL 4117362, at *11 (Tenn. Crim. App. Nov. 19, 2007), perm. app. denied, (Tenn. Apr. 7, 2008). Pursuant to the plain error doctrine, “an error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for new trial or assigned as error on appeal,” if the appellate court considers such notice “necessary to do substantial justice.” Tenn. R. Crim. P. 52(b); see Tenn. R. App. P. 36(b). In determining whether plain error review is appropriate, the following factors must be established:

- (a) The record . . . clearly establish[es] what occurred in the trial court;
- (b) a clear and unequivocal rule of law [has] been breached;
- (c) a substantial right of the accused [has] been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.”

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). On appeal, the defendant has the burden of establishing that these five factors are met. Gomez II, 239 S.W.3d at 737 (citing State v. Bledsoe, 225 S.W.3d 349, 355 (Tenn. 2007)). The appellate court need not consider all five factors if any single factor indicates that relief is not warranted. Smith, 24 S.W.3d at 283.

In this case, the record clearly reflects what happened in the trial court, as the sentencing hearing transcript appears in the record. The transcript reflects that the trial court considered whether enhancement and mitigating factors applied and weighed them in arriving at a sentencing determination. We next examine whether the sentences imposed by the trial court breached a clear and unequivocal rule of law.

An appellate court’s review of sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

At the sentencing hearing, the trial court noted the existence of one enhancement factor, abuse of a position of private trust. See Tenn. Code Ann. § 40-35-114(16) (2003). Although no evidence of proposed mitigating factors appears in the record, the trial court applied the general, “[a]ny other factor consistent with the purposes of this chapter” mitigating factor based on the fact that the defendant had no prior criminal record and was involved in his church. See Id. § 40-35-113(13). The trial court sentenced the defendant to nine years in the Department of Correction, a sentence within the eight-to-twelve-year range established by our criminal code for a defendant convicted of a Class B felony as a Range I, standard offender. See Tenn. Code Ann. § 40-35-112(a)(2) (2003).

The defendant pled guilty to counts 1, 2, 9, and 10 of the indictment. The indictment alleged that those offenses occurred “between on or about Summer 2002 and the year 2003,” and no waiver of the defendant’s ex post facto rights appears in the record. Accordingly, the sentencing act as it existed before the 2005 amendments applied to the defendant’s sentences. See 2005 Tenn. Pub. Act ch. 353, § 18 (for offenses committed before the July 7, 2005 enactment of revised sentencing act, former act applies unless defendant executes waiver permitting sentencing under new act). Under the former law, unless enhancement factors were present, the presumptive sentence to be imposed was the minimum in the range for a Class B felony. Tenn. Code Ann. § 40-35-210(c) (2003). The

pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. *Id.* at (d), (e). However, the Tennessee Supreme Court recently held that in sentences imposed pursuant to Tennessee's former sentencing act, the trial court's enhancement of a defendant's sentence based on factors that had not been found by a jury beyond a reasonable doubt violated a defendant's Sixth Amendment right to a jury trial as interpreted by the Supreme Court. *Gomez II*, 239 S.W.3d at 740-41 (citing *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 860 (2007)); See also *Blakely v. Washington*, 542 U.S. 296, 301; 124 S. Ct. 2531, 2536 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")). Thus, the trial court's application of enhancement factor (16) to the defendant's sentence violated a clear and unequivocal rule of law for plain error purposes.¹

The other plain error factors are met in this case. The trial court's denial of the defendant's Sixth Amendment right to have a jury determine sentence enhancement factors beyond a reasonable doubt affected a substantial right of the defendant, see *Gomez II*, 239 S.W.3d at 741, and the record is "silent and does not establish that the Defendant[] made a tactical decision to waive [his] Sixth Amendment claims," *id.* at 742. Finally, the record reflects that enhancement factor (16) was the only one the trial court used to enhance the defendant's sentence and that the defendant did not admit to this enhancement factor at the sentencing hearing. Therefore, consideration of this issue is necessary to do substantial justice.

In light of the above considerations, we conclude that the trial court's application of sentence enhancement factor (16) constituted plain error. Accordingly, we remand the case to the trial court for entry of eight-year sentences on each of the defendant's four aggravated sexual battery convictions.

Consecutive Sentences

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that

[t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of

¹The sentencing hearing in this case was held on June 18, 2007. In *Gomez I*, *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), the Tennessee Supreme Court held that Tennessee's former sentencing scheme did not violate the rule announced in *Blakely*. The *Gomez II* opinion was not released until October 9, 2007.

defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

Tenn. Code Ann. § 40-35-115(b)(5) (2003). The trial court is required to “specifically recite the reasons” behind imposition of a consecutive sentence. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

The defendant's first argument regarding consecutive sentencing is that the evidence produced at the sentencing hearing did not support the trial court's imposition of consecutive sentences. We disagree. In imposing consecutive sentences, the trial court went through each of the “aggravating circumstances” outlined in section 40-35-115(b)(5) and applied them to the facts of this case. Regarding the relationship between the defendant and the victim, his daughter, the trial court noted that the defendant adopted the victim when she was two years old but that the defendant's love, nurturing, and support of the victim turned into abuse by the time the victim turned eleven. Specifically, the trial court noted, “A father is to protect his daughter from dangers inside and outside the home. We've got danger inside the home there by your own hands. . . . Sexual abuse while everybody is inside the home and while your wife, her mother, is ill.” Regarding the time span of undetected sexual activity, the trial court noted that the abuse began in summer 2002, when the victim was eleven years old, and was not detected until summer 2006, some four years later.

Regarding the nature and scope of the defendant's sexual acts, the trial noted that these acts included “coming to the bathroom when she showered; pulling her shirt to expose her breasts; exposing your genitals to her in an erect state; masturbation in front of her; asking to see her vagina in exchange for driving a truck . . . fondling her breasts, touching, fondling her vagina.” The trial court labeled these acts “devastating.” Finally, regarding the extent of the residual physical and psychological damage to the victim, the trial court noted that there was “no way to measure the destruction” that his actions had caused to his daughter and his family. Specifically, the trial court noted that the victim was “depressed, crie[d] a lot, act[ed] out in negative ways, [got] in trouble at school by skipping class, lying, [and] stealing,” and that her behavior and self-esteem had deteriorated. In our view, the trial court's statement on the record of its reasons for imposing consecutive sentences met the requirements established in Tennessee Code Annotated section 40-35-115(b)(5) and Tennessee Rule of Criminal Procedure 32(c)(1). As such, the defendant's contention is without merit.

The defendant also argues that the trial court's imposition of consecutive sentences violates the principle announced by the Tennessee Supreme Court in State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987): “consecutive sentences should not routinely be imposed in sexual abuse cases . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.” In making this argument, the defendant argues that the trial court “did not take into consideration his potential for rehabilitation as set forth . . . in the psychosexual evaluation,” and

he also asserts that “the sentence imposed was not the least severe measure necessary to protect the public from the [d]efendant.” However, we find these arguments unavailing. The trial court could have imposed four consecutive sentences, but it did not. This restraint by the trial court indicates that it did consider the principles announced in Taylor and sentenced the defendant appropriately. Furthermore, based on the facts outlined by the trial court in imposing consecutive sentences, the sentence imposed did reasonably relate to the severity of the defendant’s offenses.

Finally, the defendant argues that the trial court’s imposition of consecutive sentences based on facts found by the trial court by a preponderance of the evidence violated his Sixth Amendment right to a jury trial as interpreted by the Tennessee Supreme Court in Gomez II. However, the Tennessee Supreme Court recently held that the imposition of consecutive sentences does not offend a defendant’s Sixth Amendment rights as implicated in Gomez II, Blakely, and related cases. State v. Allen, 259 S.W.3d 671, 689-90 (Tenn. 2008). This conclusion was consistent with one reached by this court on several prior occasions. See State v. John Britt, No. W2006-01210-CCA-R3-CD, 2007 WL 4355480, at *13 (Tenn. Crim. App. Dec. 12, 2007), perm. app. denied, (Tenn. Apr. 28, 2008); State v. Joseph Wayne Higgins, No. E2006-01552-CCA-R3-CD, 2007 WL 2792938, at *14 (Tenn. Crim. App. Sept. 27, 2007), no perm. app. filed; State v. Earice Roberts, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *12 (Tenn. Crim. App. Nov. 23, 2004), perm. app. denied, (Tenn. Mar. 21, 2005). As such, we affirm the trial court’s imposition of consecutive sentences in this case.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed in part and reversed in part. The case is remanded to the trial court for entry of modified sentences as outlined in this opinion.

D. KELLY THOMAS, JR., JUDGE